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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID WESLEY CASSIS,

Defendant and Appellant.

B235068

(Los Angeles County  
Super. Ct. Nos. PA064132, PA070321)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Cynthia L. Ulfig, Judge. Affirmed with directions.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Assistant Attorney General, Jason C. Tran and Dana M. Ali,  
Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant David Cassis appeals from the sentence on his convictions of one count of transportation of a controlled substance in violation of Health & Safety Code section 11379, and one count of possession for sale of a controlled substance in violation of Health and Safety Code section 11378. The trial court imposed a three-year sentence and assessed attorney fees pursuant to Penal Code section 987.8.<sup>1</sup> Defendant contends the imposition of attorney fees is not supported by substantial evidence. We reverse the attorney fees award and remand for a hearing on defendant's ability to pay.

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

#### *1. Case No. PA 064132*

In February 2009, defendant pleaded no contest to a charge of possession for sale of a controlled substance in violation of Health & Safety Code section 11378 in Case No. PA064132. In March 2009, the court suspended sentence and placed defendant on probation with the condition that he serve 180 days in county jail. In addition, the court ordered defendant to pay a \$20 court security fee (Penal Code, § 1465.8, subd. (a)(1)), a \$30 criminal conviction fee (Gov. Code, § 70373), a \$10 criminal fine surcharge (Penal Code, § 1465.7), and a \$200 restitution fine (Penal Code, § 1202.4, subd. (b)). A probation revocation fine (Penal Code, § 1202.44) in the same amount was imposed and stayed.

On July 22, 2010, defendant admitted violating the terms of his probation. The court reinstated probation on condition that defendant serve 180 days in county jail.

#### *2. Case No. PA 070321*

On March 16, 2011, at 3:45 p.m., police officers observed defendant driving on Pinewood. The officers ran a check of the license plate and discovered a felony arrest warrant for the registered owner of the car, Chad Cassis, who was defendant's son. Police stopped defendant, and a consent search of the vehicle yielded 28.62 grams of methamphetamine.

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<sup>1</sup> All statutory references herein are to the Penal Code unless otherwise noted.

On April 11, 2011, defendant was charged with one count of possession for sale of a controlled substance in violation of Health & Safety Code section 11378, and one count of transportation of a controlled substance in violation of Health & Safety Code section 11379, subdivision (a). The information further alleged defendant had suffered a prior conviction within the meaning of Health & Safety Code section 11370.2, subdivision (b). Defendant pleaded not guilty and denied the special allegation.

On the eve of trial, defendant was offered on count two a plea term of three years, with admission of defendant's probation violation in Case No. PA064132 and sentence on the probation violation to run concurrently. Although he initially appeared to agree to the plea agreement, defendant pleaded not guilty and requested to represent himself. The court denied defendant's request to represent himself. Defendant advised the court he wanted to hire private counsel; the court denied the request. Defendant advised the court he had hired attorney James Blatt, and explained that Mr. Blatt was not in court because defendant had not had access to a telephone. The court asked, "Have you retained him, given him money?" to which defendant responded, "I have not given him money. I can give him money today." Defendant told the court he had discussed Blatt's fee schedule with Blatt.

During a recess in the proceedings, defendant spoke to Blatt, who advised him to take the plea agreement. Defendant pleaded no contest to count two.

The court denied probation in Case No. PA070321, and sentenced defendant to the midterm of three years on count two. In addition, the court ordered defendant to register as a narcotics offender, to pay a \$40 court security fee (Penal Code, § 1465.8, subd. (a)(1)), a \$40 criminal fine surcharge (Penal Code, § 1465.7), a \$30 criminal conviction fee (Gov. Code, § 70373), a \$150 drug program fee (Health & Saf. Code, § 11372.7) with a \$420 penalty assessment (Penal Code, § 1464; Gov. Code, § 76000), a \$50 crime laboratory analysis fee (Health & Saf. Code, § 11372.5) with a \$140 penalty assessment (Penal Code, § 1464; Gov. Code, § 76000), and a \$600 restitution fine (Penal Code, § 1202.4, subd. (b)). The court imposed and stayed a parole revocation fine (Penal Code,

§ 1202.45) in the same amount. In addition, defendant was ordered to pay \$266 in attorney fees pursuant to section 987.8. Defendant was awarded presentence custody credit of 216 days, consisting of 108 actual days and 108 days of conduct credit.

In case number PA064132, the court revoked probation, and sentenced defendant to a concurrent midterm of two years on count one. The court ordered defendant to register as a narcotics offender, to pay a \$40 court security fee (Penal Code, § 1465.8, subd. (a)(1)), a \$40 criminal fine surcharge (Penal Code, § 1465.7), a \$30 criminal conviction fee (Gov. Code, § 70373), a \$150 drug program fee (Health & Saf. Code, § 11372.7), a \$50 crime laboratory analysis fee (Health & Saf. Code, § 11372.5) with an \$85 penalty assessment (Penal Code, § 1464; Gov. Code, § 76000), and a \$200 restitution fine (Penal Code, § 1202.4, subd. (b)). A parole revocation fine (Penal Code, § 1202.45) in the same amount was imposed and stayed. Further, the court ordered defendant to pay the \$200 probation revocation fine that had been previously imposed and stayed pursuant to Penal Code section 1202.44. In addition, defendant was ordered to pay \$266 in attorney fees pursuant to Penal Code section 987.8. Defendant was awarded presentence custody credit of 417 days, consisting of 209 actual days and 208 days of conduct credit.

### **DISCUSSION**

Defendant argues because the court imposed \$266 in attorney fees in both cases without making the required findings that he had the ability to pay, insufficient evidence supports the imposition of such attorney fees, requiring reversal. He further contends that his trial counsel's failure to object to the imposition of attorney fees does not waive the issue on appeal. The People argue that defendant forfeited his challenge to the attorneys' fee order by failing to object in the trial court; the record supports an implied finding of unusual circumstances and defendant's ability to pay because defendant indicated to the court he had the funds ready to pay counsel (see *People v. Phillips* (1994) 25 Cal.App.4th 62, 71); and request that if we find insufficient evidence supports the fee order, that we remand for a determination of defendant's ability to pay in the trial court. (*People v. Flores* (2003) 30 Cal.4th 1059, 1068–1069.)

Section 987.8 establishes the means for a county to recover some or all of the costs of defense expended on behalf of an indigent criminal defendant. (*Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1245.) Under subdivisions (b) and (c) of the statute, an order of reimbursement can be made only if the court concludes, after notice and an evidentiary hearing, that the defendant has “the present ability . . . to pay all or a portion” of the defense costs. (§ 987.8, subs. (b), (c), (e); *People v. Amor* (1974) 12 Cal.3d 20, 29; *People v. Phillips*, *supra*, 25 Cal.App.4th at p. 72–73.)<sup>2</sup> If this finding is made, “the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant’s financial ability.” (§ 987.8, subd. (e).)

“Ability to pay” means “the overall capability” of the defendant to reimburse all or a portion of the defense costs. (§ 987.8, subd. (g)(2).) Ability to pay requires consideration of the defendant’s financial position at the time of the hearing, his or her “reasonably discernible” financial position over the subsequent six months, including the likelihood of employment during that time, and “[a]ny other factor or factors which may bear upon the defendant’s financial capability to reimburse the county.” (§ 987.8, subs. (g)(2)(A)–(D).)

In calculating ability to pay, “the court [must] consider what resources the defendant has available and which of those resources can support the required payment,” including both the defendant’s likely income and his or her assets. (*People v. Smith*

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<sup>2</sup> Section 987.8, subdivision (b) states: “In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided.”

(2000) 81 Cal.App.4th 630, 642; see, e.g., *Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 842 [bank account]; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1394 [real property].)

While the statutory language does not mandate an express finding of an ability to pay, the statute contains a presumption that those sentenced to prison do not have the ability to pay. (§ 987.8, subd. (g)(2)(B); *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.) Thus, the court must make an express finding of unusual circumstances before ordering a state prisoner to reimburse his or her attorney. (*Lopez*, at p. 1537; cf. *People v. Phillips*, *supra*, 25 Cal.App.4th at p. 71 [where defendant admitted he would be earning \$800 per month for two months prior to incarceration, implied finding of ability to pay supported by sufficient evidence].)

Where the defendant has been deprived of notice and a hearing on his or her ability to pay, the matter may be remanded for a proper determination under section 987.8 of the defendant's ability to pay. (*People v. Flores*, *supra*, 30 Cal.4th at p. 1069.) As *Flores* observed, “[d]efendant may not be able to pay [the sums] ordered by the trial court, but he may be able to pay something, and if he can, he is obligated by the statute to do so. In any event, . . . whether defendant's financial circumstances are [in fact] unusual for someone sentenced to prison is not [before this court], and rather than speculate about it, we affirm the Court of Appeal's remanded order so that the trial court may, after having conducted a hearing into the question, make an informed decision.” (*Id.* at pp. 1068–1069.)

Where, as here, the defendant's objections to the fee order go to the sufficiency of the evidence to support the order, no objection need be made in the trial court. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.) Thus, defendant did not waive his right to object to the lack of any finding concerning his ability to pay.

On the merits, we conclude that the record does not contain substantial evidence that defendant had the ability to pay. The court conducted no evidentiary hearing in the matter, and defendant's bare statement that he had the money to pay his attorney when confronted with a denial of his request to represent himself and a denial of his request to

substitute in retained counsel is no substitute for an evidentiary hearing to determine whether defendant had sufficient resources to undertake such a financial obligation. Thus, we remand the matter for a determination under section 987.8 of defendant's ability to pay attorney fees.

**DISPOSITION**

The judgment of the superior court is affirmed, and the matter is remanded for a determination of defendant's ability to pay attorney fees under Penal Code section 987.8.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.